EXHIBIT

II

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re DERRECK SUNDERLAND,
on Habeas Corpus.

A116379

(San Francisco County
Super. Ct. No. 5416)

BY THE COURT:

The petition for a writ of habeas corpus is denied.

(Ruvolo, P.J., Reardon, J., and Sepulveda, J., joined in the decision.)

Date: _____ RUVOLO, P.J. P.J.

EXHIBIT 8

United States District Court

Eastern District of California

Melvyn H. Coleman,

Petitioner,

vs.

Board of Prison Terms, et al.,

Respondents.

No. Civ. S-96-0783 LKK PAN P

Findings and Recommendations

-oOo-

Petitioner seeks a writ of habeas corpus.

In his November 14, 1997, second amended petition petitioner claims his federal due process guarantee was violated because the California Board of Prison Terms (Board) has failed to conduct a fair parole suitability hearing.

In 1974 petitioner was convicted of first degree murder, attempted murder, first degree robbery, first degree burglary and other charges. The victims, Mr. And Mrs. Siewart, returned to their home while petitioner was burglarizing it; he then

approached before they got out of their car and robbed and shot them, killing Mr. Siewart and seriously wounding Mrs. Siewart. Petitioner had a prior juvenile record.

Under California law, a prisoner including a convicted murderer serving an indeterminate term (i.e., seven years to life) is entitled to a hearing before a panel composed of members of the Board to determine his suitability for parole. By statute, parole at some point normally is appropriate and the Board "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration. . . ." Cal. Penal Code § 3041(b). Procedures governing suitability hearings are set forth in Penal Code § 3041.5 (providing prisoners with notice and an opportunity to be heard and requiring a written statement of reasons if the panel refuses to set a parole date). Regulations prescribe factors for the panel to consider in determining whether each prisoner is suitable or unsuitable for parole. 15 CAC § 2281.[1]

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[1] Factors supporting a finding of unsuitability include: (1) whether the prisoner's offense for which he is confined was committed in an "especially heinous, atrocious or cruel manner"; (2) the prisoner's record of violence prior to the offense; (3) whether the prisoner has an unstable social history; (4) whether the prisoner has committed sadistic sexual offenses; (5) whether the prisoner has a lengthy history of severe mental problems related to the offense; and (6) whether the prisoner has engaged in serious misconduct in prison or jail. Factors supporting a finding of suitability include: (1) whether the prisoner has a juvenile record; (2) whether the prisoner has experienced reasonably stable relationships with others; (3) whether the prisoner shows signs of remorse; (4)

Petitioner presents evidence that under Governors Wilson and Davis the Board disregarded regulations ensuring fair suitability hearings and instead operated under a sub rosa policy that all murderers be found unsuitable for parole. The record shows that between 1992 and 1998 less than one percent of the prisoners in this group were released on parole. During the previous period the parole rate had been about four percent. Petitioner presents sworn testimony that the policy was enforced by (1) appointing Board members less likely to grant parole and more willing to disregard their statutory duty; (2) removing Board members more likely to grant parole; (3) reviewing decisions finding a prisoner suitable and setting a new hearing before a different panel; (4) scheduling rescission hearings for prisoners who had been granted a parole date; (5) re-hearing favorable rescission proceedings and hand-picking panels to ensure the desired outcome; (6) panel members agreeing upon an outcome in advance of the hearing; and (7) gubernatorial reversal of favorable parole decisions. See e.g., declaration of former BPT Commissioner Albert Leddy (Leddy) paras. 5, 6, 8-17, 20 (attached as Ex. 17 to petitioner's March 27, 2003, motion for discovery); deposition of Leddy taken in In re Fortin, et al., San Diego Superior Court

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whether the prisoner committed his crime as the result of significant stress in his life; (5) whether the prisoner suffered from Battered Woman Syndrome when she committed the crime; (6) whether the prisoner lacks any significant history of violent crime; (7) whether the prisoner's present age reduces the probability of recidivism; (8) whether the prisoner has made realistic plans for release or has developed marketable skills that can be put to use on release; and (9) whether the prisoner's institutional activities indicate an enhanced ability to function within the law upon release. 15 CAC § 2281.

case number HSC10279 at 18-19, 47-50, 56-59, 61-63, 65-66, 88-89, 95, 97-99, 102, 106, 110, 118 & 126 (attached as Ex. 10 to petitioner's March 27, 2003, motion for discovery); deposition of former BPT Commissioner Edmund Tong taken in Kimble v. Cal. BPT, C.D. Cal. case number CV 97-2752 at 42-43, 45-47, 71, 73, 80-82, 85-86, 96, 103, 105, 107 & 109 (lodged December 30, 2003).[2]

The unrefuted record shows the no-parole-for-murderers policy existed and continued under Governor Davis. In In re Rosencrantz, the California Supreme Court took note of evidence presented in the state trial court establishing that the Board held 4800 parole suitability hearings between January 1999 through April 2001, granting parole to 48 murderers (one percent). 29 Cal. 4th 616, 685 (2003). Of those 48, the governor reversed 47 of the Board's decisions and only one murderer out of 4800 actually was released on parole. Id. Petitioner in Rosenkrantz also submitted evidence of the following interview of Governor Davis reflected in the April 9, 1999, edition of the Los Angeles Times: " '. . . [T]he governor was adamant that he believes murderers - even those with second-degree convictions - should serve at least a life sentence in prison. [Para.] Asked whether extenuating circumstances should

[2] Meanwhile, the annual cost to taxpayers of conducting these "pro forma" hearings is enormous, amounting to millions of dollars per year. See Exhibit 7 to petitioner's March 27, 2003, motion for discovery (California Legislative Analyst's Office - Analysis of the 2000-01 Budget Bill for the Board of Prison Terms criticizing proposed $19 million annual budget and noting huge cost of additional incarceration resulting from no-parole policy).

be a factor in murder sentences, the governor was blunt: "No. Zero . . . They must not have been listening when I was campaigning. . . . If you take someone else's life, forget it. I just think people dismiss what I said in the campaign as either political hyperbole or something that I would back away from . . . . We are doing exactly what we said we were going to do."'" 29 Cal. 4th at 684.

Respondent does not refute the alleged facts. Instead, respondent argues that, assuming arguendo prisoners in California have an interest in a parole date protected by the due process clause, constitutional requirements are met so long as there is "some evidence" supporting the findings petitioner is unsuitable. See Oppo. at 7:20 (so long as "some evidence" standard is met, "the Board decisions could not have been arbitrary.") For the reasons explained, this court rejects that claim. As this court previously has found, there always will be "some evidence" that can be used to explain a denial or rescission under the circumstances. Federal due process requires more.

California's parole scheme gives rise to a protected liberty interest in release on parole. McQuillion v. Duncan, 306 F.3d 895, 902 (2002); Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979); Biggs v. Terhune, 334

F.3d 910, 915 (9th Cir. 2003); In re Rosenkrantz, 29 Cal. 4th 616 (2003).[3]

Therefore, petitioner is entitled to the process outlined in Greenholtz, viz., notice, opportunity to be heard, a statement of reasons for decision, and limited right to call and cross-examine witnesses. The determination that petitioner is unsuitable for parole must be supported by some evidence bearing some indicia of reliability.

These guarantees do not exhaust petitioner's right to due process. The fundamental core of due process is protection against arbitrary action:

> The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in Bank of Columbia v. Okely, 17 U.S. 235, 4 Wheat. 235-244, 4 L.Ed. 449 [(1819)]: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

Hurtado v. California, 110 U.S. 516, 527, (1884). "The concessions of Magna Charta were wrung from the king as guaranties against the oppressions and usurpations of his

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[3] That is so because the parole statute, Penal Code § 3041, uses mandatory language ("The panel or board shall set a release date unless it determines" further incarceration is necessary in the interest of public safety) which "'creates a presumption that parole release will be granted,' unless the statutorily defined determinations are made. Board of Pardons v. Allen, 482 U.S. 369, 378 (1987) (quoting Greenholtz, 442 U.S. at 12). As of 1988, by amendment of the state constitution, a parole date given can be withdrawn by the Governor under the same factors considered by the Board.

prerogative." Id. at 531. "The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974), citing Dent v. West Virginia, 129 U.S. 114 (1889).

A government official's arbitrary and capricious exercise of his authority violates the essence of due process, contrary to centureis of Anglo-American jurisprudence. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."); United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."); U.S. v. Nixon, 418 U.S. 683, 695-96 (1974) (rule of law is "historic commitment"); Accardi v. O'Shaughnessy, 347 U.S. 260, 267-68 (1954) (Attorney General must abide by regulations and cannot dictate immigration board's exercise of discretion in decision on application to suspend

deportation; remedy is new hearing where board will exercise it's discretion free from bias).

Concomitant to the guarantee against arbitrary and capricious state action is the right to a fact-finder who has not predetermined the outcome of a hearing. See Withrow v. Larkin, 421 U.S. 35 (1975) (a fair trial in a fair tribunal is a basic requirement of due process, and this rule applies to administrative agencies which adjudicate as well as to courts); Edwards v. Balisok, 520 U.S. 641 (1997) (recognizing due process claim based on allegations that prison disciplinary hearing officer was biased and would suppress evidence of innocence); Bakalis v. Golembeski, 35 F.3d 318, 326 (7th Cir. 1994) (a decision-making body "that has prejudged the outcome cannot render a decision that comports with due process").

Courts too numerous to list have recognized that the right to a disinterested decision-maker, who has not prejudged the case, is part of the fundamental guarantee against arbitrary and capricious government conduct in the California parole context. See, e.g., Rosenkrantz, 29 Cal. 4th at 677 (parole decision "must reflect an individualized consideration of the specified criteria and cannot be arbitrary and capricious"); In re Ramirez, 94 Cal. App. 4th 549, 563 (2001) ("some evidence" standard is "only one aspect of judicial review for compliance with minimum standards of due process" (citing Balisok) and Board violates due process if its decision is "arbitrary and capricious"); In re Minnis, 7 Cal. 3d 639 (1972) (blanket no-parole policy as to certain

category of prisoners is illegal); In re Morrall, 102 Cal. App. 4th 280 (2003) (same). The guarantee of neutral parole officials in a suitability hearing is just as fundamental as the right to a neutral judge in a court proceeding. Compare Sellars v. Procunier, 641 F.2d 1295 (9th Cir. 1981) (holding that California parole officials, analogous to judges, are entitled to absolute immunity).

The Ninth Circuit previously has acknowledged California inmates' due process right to parole consideration by neutral decision-makers. See O'Bremski v. Maas, 915 F.2d 418, 422 (9th Cir. 1990). In that case the appellate court found that a neutral parole panel at a new hearing would reach the same outcome and so denied relief. The record in this case simply will not permit the same conclusion. The requirement of an impartial decision-maker transcends concern for diminishing the likelihood of error. As the Supreme Court clearly held in Balisok a decision made by a fact-finder who has predetermined the outcome is per se invalid -- even where there is ample evidence to support it. 520 U.S. at 648.

Petitioner presents a convincing case that a blanket policy against parole for murderers prevented him from obtaining a parole suitability determination made after a fair hearing. Respondent offers nothing to counter petitioner's showing.

Accordingly, the court hereby recommends that the petition for habeas corpus be granted unless, within 60 days of the district court's adoption of these recommendations, respondent

provides a fair parole suitability hearing, conducted by a board free of any prejudice stemming from a gubernatorial policy against parole for murderers.

Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these findings and recommendations are submitted to the United States District Judge assigned to this case. Within 20 days after being served with these findings and recommendations, respondent may file written objections. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge may accept, reject, or modify these findings and recommendations in whole or in part.

Dated: DEC 21 2004.

Peter A. Nowinski
Magistrate Judge

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bd

United States District Court
for the
Eastern District of California
December 22, 2004

* * CERTIFICATE OF SERVICE * *

2:96-cv-00783

Coleman

v.

Board of Prison Term

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 22, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY: _____
Deputy Clerk

EXHIBIT 9

[redacted]

(ENDORSED)
FILED
AUG 30 2007
KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
BY BRET MORROW DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

In re

ARTHUR CRISCIONE,

On Habeas Corpus

No.: 71614

ORDER

INTRODUCTION

Petitioner alleges that he has been denied due process of law because the Board has used standards and criteria which are unconstitutionally vague in order to find him unsuitable for parole. Alternatively, he argues that those standards, even if constitutionally sound, are nonetheless being applied in an arbitrary and meaningless fashion by the Board. He relies upon evidence that in one hundred percent of 2690 randomly chosen cases, the Board found the commitment offense to be "especially heinous, atrocious or cruel", a factor tending to show unsuitability under Title 15 §2402(c)(1).

Are the Board Criteria Unconstitutionally Vague?

Our courts have long recognized that both state and federal due process requirements dictate that the Board must apply detailed standards when evaluating whether an individual inmate is unsuitable for parole on public safety grounds. (See *In re Dannenberg* (2005) 34

Cal.4th 1061 at p. 1096, footnote 16.). Those standards are found in 15 CCR §2402(c) (*Dannenberg, supra,* 34 Cal.4th at p. 1080,) and do include detailed criteria to be applied by the Board when considering the commitment offense:

> (c) Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:
>
> (1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:
>
> (A) Multiple victims were attacked, injured or killed in the same or separate incidents.
>
> (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.
>
> (C) The victim was abused, defiled or mutilated during or after the offense.
>
> (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.
>
> (E) The motive for the crime is inexplicable or very trivial in relation to the offense.

In response to Petitioners claim that the regulations are impermissibly vague, Respondent argues that while "especially heinous, atrocious or cruel" might be vague in the abstract it is limited by factors (A)-(E) of §2402(c)(1), and thus provides a 'principled basis' for distinguishing between those cases which are contemplated in that section and those which are not. An examination of cases involving vagueness challenges to death penalty statutes is instructive here and shows that Respondent's position has merit:

"Our precedents make clear that a State's capital sentencing

> scheme also must genuinely narrow the class of persons eligible for the death penalty. When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so. If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." (*Arave v. Creech* (1993) 507 U.S. 463, 474, citing *Maynard v. Cartwright* (1988) 486 U.S. 356, 364: "invalidating aggravating circumstance that 'an ordinary person could honestly believe' described every murder," and, *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429: "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'")

It cannot fairly be said that 'every murder' could be categorized as "especially heinous, atrocious or cruel" under the Board regulations, since the defining factors contained in subdivisions (A)-(E) clearly narrow the group of cases to which it applies. Although Petitioner also argues that the "vague statutory language is not rendered more precise by defining it in terms or synonyms of equal or greater uncertainty" (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803, *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 249. *See also Walton v. Arizona* (1990) 497 U.S. 639, 654), the factors in those subdivisions are not themselves vague or uncertain. The mere fact that there may be some subjective component (such as "exceptionally callous" disregard for human suffering) does not render that factor unconstitutionally vague. The proper degree of definition of such factors is not susceptible of mathematical precision, but will be constitutionally sufficient if it gives meaningful guidance to the Board.

> A law is void for vagueness if it "fails to provide adequate notice to those who must observe its strictures and impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and

discriminatory application." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1116, quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109.)

A review of cases expressing approval of definitions to limit the application of otherwise vague terms in death penalty statutes leads inextricably to the conclusion that the limiting factors in §2402(c) easily pass constitutional muster. An Arizona statute was upheld that provided a crime is committed in an 'especially cruel manner' when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "mental anguish includes a victim's uncertainty as to his ultimate fate." (*Walton v. Arizona* (1990) 497 U.S. 639, 654.) Similarly, the court in *Maynard v. Cartwright*, 486 U.S. at 364-365, approved a definition that would limit Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance to murders involving "some kind of torture or physical abuse. In Florida, the statute authorizing the death penalty if the crime is "especially heinous, atrocious, or cruel," satisfied due process concerns where it was further defined as "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon* (1973) 283 So. 2d 1 at p. 9.

Here, the factors in subdivisions (A)-(E) provide equally clear limiting construction to the term "especially heinous, atrocious, or cruel" in §2402(c).

Has the Board Engaged in a Pattern of Arbitrary Application of the Criteria?

As previously noted, 15 CCR §2402 provides detailed criteria for determining whether a crime is "exceptionally heinous, atrocious or cruel" such that it tends to indicate unsuitability for parole. Our

courts have held that to fit within those criteria and thus serve as a basis for a finding of unsuitability, the circumstances of the crime must be more aggravated or violent than the minimum necessary to sustain a conviction for that offense. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 682-683.) Where that is the case, the nature of the prisoner's offense, *alone*, can constitute a sufficient basis for denying parole. (*In re Dannenberg, supra*, 34 Cal.4th at p. 1095.)

Petitioner claims that those criteria, even if constitutionally sound, have been applied by the Board in an arbitrary and capricious manner rendering them devoid of any meaning whatever. The role of the reviewing court under these circumstances has been addressed previously in the specific context of Parole Board actions:

> "[Courts have] an obligation, however, to look beyond the facial validity of a statute that is subject to possible unconstitutional administration since a law though fair on its face and impartial in appearance may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. We have recognized that this court's obligation to oversee the execution of the penal laws of California extends not only to judicial proceedings, but also to the administration of the Indeterminate Sentence Law." (*In re Rodriguez* (1975) 14 Cal.3d 639, 648, quoting *Minnesota v. Probate Court* (1940) 309 U.S. 270, 277.)

Similarly, in *In re Minnis* (1972) 7 Cal.3d 639, 645, the case closest on point to the present situation, the California Supreme Court stated: "This court has traditionally accepted its responsibility to prevent an authority vested with discretion from implementing a policy which would defeat the legislative motive for enacting a system of laws." Where, as here, the question is whether determinations are being made in a manner that is arbitrary and capricious, judicial oversight "must be extensive enough to protect

limited right of parole applicants 'to be free from an arbitrary parole decision... and to something more than mere pro-forma consideration.'" (*In re Ramirez* (2001) 94 Cal.App.4th 549 at p. 564, quoting *In re Sturm* (1974) 11 Cal.3d 258 at p. 268.)

This Court, therefore, now examines Petitioner's "as applied" void for vagueness challenge.

The Evidence Presented

A similar claim to those raised here, involving allegations of abuse of discretion by the Board in making parole decisions, was presented to the Court of Appeal in *In re Ramirez, supra*. The court there observed that such a "serious claim of abuse of discretion" must be "adequately supported with evidence" which should be "comprehensive." (*Ramirez, supra*, 94 Cal.App.4th at p. 564, fn. 5.) The claim was rejected in that case because there was not "a sufficient record to evaluate." (*Ibid.*) In these cases, however, there is comprehensive evidence offered in support of Petitioner's claims.

Discovery orders were issued in five different cases involving life term inmates (Petitioners) who all presented identical claims.[1]

[1] This Court takes judicial notice of the several other cases currently pending (Lewis #68038, Jameison #71194, Bragg #108543, Ngo #127611.) which raise this same issue and in which proof was presented on this same point. (Evidence Code § 452(d). See specifically, in the habeas corpus context, *In re Vargas* (2000) 83 Cal.App.4th 1125, 1134-1136, 1143, in which judicial notice was taken of the evidence in four other cases and in which the court noted: "Facts from other cases may assist petitioner in establishing a pattern." See generally *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491: "trial and appellate courts ... may properly take judicial notice of ... established facts from both the same case and other cases." And see *AB Group v. Wertin* (1997) 59 Cal.App.4th 1022, 1036: Judicial notice taken of other cases when matters are "just as relevant to the present [case] as they are to the others.")

The purpose of the discovery was to bring before the Court a comprehensive compilation and examination of Board decisions in a statistically significant number of cases. The Board decisions under examination consisted of final decisions of the Board for life-term inmates convicted of first or second degree murder and presently eligible for parole. Included were all such decisions issued in certain months, chosen by virtue of their proximity in time to the parole denials challenged in the pending petitions. All Board decisions in the months of August, September and October of 2002, July, August, September, October, November, and December of 2003, January and February of 2004, February of 2005, and January of 2006 were compiled. This resulted in a review of 2690 cases decided in a total of 13 months.

The purpose of the review was to determine how many inmates had actually been denied parole based in whole or in part on the Board's finding that their commitment offense fits the criteria set forth in Title 15 §2402(c)(1) as "especially heinous, atrocious or cruel." A member of the research team conducting the review, Karen Rega, testified that in its decisions the Board does not actually cite CCR rule §2402(c), but consistently uses the specific words or phrases ("verbiage from code") contained therein, so that it could easily be determined when that criteria was being applied. (For example, finding "multiple victims" invokes §2402(c)(1)(A); finding the crime "dispassionate" "calculated" or "execution style" invokes §2402(c)(1)(B); that a victim was "abused" "mutilated" or "defiled" invokes §2402(c)(1)(C); a crime that is "exceptionally callous" or demonstrated a "disregard for human suffering" fits criteria

§2402(c)(1)(D); and finding the motive for the crime "inexplicable" or "trivial" invokes §2402(c)(1)(E).)

Petitioners provided charts, summaries, declarations, and the raw data establishing the above in the cases of Lewis #68038, Jameison #71194, Bragg #108543, and Ngo #127611. In this case (Criscione #71614) the evidence was presented somewhat differently. Both to spread the burden of the exhaustive examination, and to provide a check on Petitioners' methods, this Court ordered Respondent to undertake an examination of two randomly chosen months in the same manner as Petitioner had been doing. Respondent complied and provided periodic updates in which they continued to report that at all "the relevant hearings the Board relied on the commitment offense as a basis for denying parole." (See "Respondent's Final Discovery Update" filed April 5, 2007.) At the evidentiary hearing on this matter counsel for Respondents stipulated that "in all of those cases examined [by Respondent pursuant to the Criscione discovery orders] the Board relied on the commitment offense as a basis for denying parole." (See pages 34-35 of the June 1, 2007, evidentiary hearing transcript.)

The result of the initial examination was that in over 90 percent of cases the Board had found the commitment offense to be "especially heinous, atrocious or cruel" as set forth in Title 15 §2402(c)(1). In the remaining 10% of cases either parole had been granted, or it was unclear whether §2402(c)(1) was a reason for the parole denial. For all such cases, the decisions in the prior hearing for the inmate were obtained and examined. In every case, the Board had determined at some point in time that every inmates

crime was "especially heinous, atrocious or cruel" under Title 15 §2402(c)(1).

Thus, it was shown that 100% of commitment offenses reviewed by the Board during the 13 months under examination were found to be "especially heinous, atrocious or cruel" under Title 15 §2402(c)(1).

A further statistic of significance in this case is that there are only 9,750 inmates total who are eligible for, and who are currently receiving, parole consideration hearings as life term inmates. (See "Respondent's Evidentiary Hearing Brief," at p. 4, filed April 16, 2007.)

USE OF STATISTICS

In *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 338-340, the United States Supreme Court reaffirmed that statistical evidence, of sufficient "proportions," can be sound and compelling proof. As noted by the court in *Everett v. Superior Court* (2002) 104 Cal.App.4th 388, 393, and the cases cited therein, "courts regularly have employed statistics to support an inference of intentional discrimination."

More recently, the United States Supreme Court, in *Miller-El v. Cockrell* (2003) 537 U.S. 322, 154 L.Ed.2d 931, when examining a habeas petitioner's allegations that the prosecutor was illegally using his peremptory challenges to exclude African-Americans from the petitioner's jury, noted that "the statistical evidence alone" was compelling. The high court analyzed the numbers and concluded: "Happenstance is unlikely to produce this disparity." (See also *People v. Hofsheier* (2004) 117 Cal.App.4th 438 in which "statistical

evidence" was noted as possibly being dispositive. And see *People v. Flores* (2006) 144 Cal.App.4th 625 in which a statistical survey and analysis, combined into an "actuarial instrument" was substantial proof.)

A statistical compilation and examination such as has been presented in these cases is entirely appropriate and sufficient evidence from which to draw sound conclusions about the Board's overall methods and practices.

THE EXPERT'S TESTIMONY

Petitioners provided expert testimony from Professor Mohammad Kafai regarding the statistics and the conclusions that necessarily follow from them. Professor Kafai is the director of the statistics program at San Francisco State University, he personally teaches statistics and probabilities, and it was undisputed that he was qualified to give the expert testimony that he did. No evidence was presented that conflicts or contradicts the testimony and conclusions of Professor Kafai. By stipulation of the parties, Professor Kafai's testimony was to be admissible and considered in the cases of all five petitioners. (See page 35 of the June 1, 2007, evidentiary hearing transcript.)

Professor Kafai testified that the samples in each case, which consisted of two or three months of Board decisions, are statistically sufficient to draw conclusions about the entire population of life term inmates currently facing parole eligibility hearings. Given that every inmate within the statistically significant samples had his or her crime labeled "'particularly

egregious'" or "especially heinous, atrocious or cruel" under Title 15 §2402(c)(1), it can be mathematically concluded that the same finding has been made for every inmate in the entire population of 9,750. Although he testified that statisticians never like to state unequivocally that something is proven to a 100% certainty, (because unforeseen anomalies are always theoretically possible,) he did indicate the evidence he had thus far examined came as close to that conclusion as could be allowed. Not surprisingly, Professor Kafai also testified that "more than 50% can't by definition constitute an exception."

Having found the data provided to the expert to be sound this Court also finds the expert's conclusions to be sound. In each of the five cases before the Court over 400 inmates were randomly chosen for examination. That number was statistically significant and was enough for the expert to draw conclusions about the entire population of 9,750 parole eligible inmates. The fact that the approximately 2000 inmates examined in the other cases also had their parole denied based entirely or in part on the crime itself (§2402(c)(1)), both corroborates and validates the expert's conclusion in each individual case and also provides an overwhelming and irrefutable sample size from which even a non expert can confidently draw conclusions.

DISCUSSION

Although the evidence establishes that the Board frequently says parole is denied "first," "foremost," "primarily," or "mainly," because of the commitment offense, this statement of primacy or weight is not relevant to the question now before the Court.

Petitioners acknowledge that the Board generally also cites other reasons for its decision. The question before this Court, however, is not whether the commitment offense is the primary or sole reason why parole is denied -- the question is whether the commitment offense is labeled "'particularly egregious'" and thus could be used, under *Dannenberg*, primarily or exclusively to deny parole.

The evidence proves that in a relevant and statistically significant period where the Board has considered life term offenses in the context of a parole suitability determination, every such offense has been found to be "particularly egregious" or "especially heinous, atrocious or cruel."[2] This evidence conclusively demonstrates that the Board completely disregards the detailed standards and criteria of §2402(c). "Especially" means particularly, or "to a distinctly greater extent or degree than is common."[3] (EC § 451(e).) By simple definition the term "especially" as contained in section 2402(C)(1) cannot possibly apply in 100% of cases, yet that is precisely how it has been applied by the Board. As pointed out by the Second District Court of Appeal, not every murder can be found to be "atrocious, heinous, or callous" or the equivalent without "doing

[3] In a single case out of the 2690 that were examined Petitioner has conceded that the Board did not invoke §2402(c)(1). This Court finds that concession to be improvidently made and the result of over caution. When announcing the decision at the initial hearing of S. Fletcher (H-10330) on 4/6/06, the commissioner did begin by stating "I don't believe this offense is particularly aggravated..." However the commissioner proceeds to describe the crime as a drug deal to which Fletcher brought a gun so "we could say there was some measure of calculation in that." The commissioner continued by observing that the reason someone would bring a gun to a drug transaction was to make sure things went according to their plan "so I guess we can say that that represents calculation and perhaps it's aggravated to that extent." As is the Board's standard practice, by using the word 'calculated' from §2402(c)(1)(b) the Board was invoking that regulation. Certainly if Mr. Fletcher had brought a habeas petition Respondent's position would be that there is 'some evidence' supporting this. The ambiguity created by the commissioner's initial statement was cleared up several pages later when he announces that "based upon the crime coupled with ..." parole was denied for four years. (See *In re Burns* (2006) 136 Cal.App.4th 1318, 1326, holding §2402(c)(1) criteria are necessary for a multi-year denial.)

violence" to the requirements of due process. (*In re Lawrence* (2007) 150 Cal.App.4th 1511, 1557.) This is precisely what has occurred here, where the evidence shows that the determinations of the Board in this regard are made not on the basis of detailed guidelines and individualized consideration, but rather through the use of all encompassing catch phrases gleaned from the regulations.

THE BOARD'S METHODS

Because it makes no effort to distinguish the applicability of the criteria between one case and another, the Board is able to force every case of murder into one or more of the categories contained in §2402(c).

For example, if the inmate's actions result in an instant death the Board finds that it was done in a "dispassionate and calculated manner, such as an execution-style murder." At the same time the Board finds that a murder not resulting in near instant death shows a "callous disregard for human suffering" without any further analysis or articulation of facts which justify that conclusion. If a knife or blunt object was used, the victim was "abused, defiled, or mutilated." If a gun was used the murder was performed in a "dispassionate and calculated manner, such as an execution-style murder." If bare hands were used to extinguish another human life then the crime is "particularly heinous and atrocious."

Similarly, if several acts, spanning some amount of time, were necessary for the murder the Board may deny parole because the inmate had "opportunities to stop" but did not. However if the murder was

[3] Princeton University World Net Dictionary (2006).

accomplished quickly parole will be denied because it was done in a dispassionate and calculated manner and the victim never had a chance to defend themselves or flee. If the crime occurred in public, or with other people in the vicinity, it has been said that the inmate "showed a callous disregard" or "lack of respect" for the "community." However if the crime occurs when the victim is found alone it could be said that the inmate's actions were aggravated because the victim was isolated and more vulnerable.

In this manner, under the Board's cursory approach, every murder has been found to fit within the unsuitability criteria. What this reduces to is nothing less than a denial of parole for the very reason the inmates are present before the Board - i.e. they committed murder. It is circular reasoning, or in fact no reasoning at all, for the Board to begin each hearing by stating the inmate is before them for parole consideration, having passed the minimum eligible parole date based on a murder conviction, and for the Board to then conclude that parole will be denied because the inmate committed acts that amount to nothing more than the minimum necessary to convict them of that crime. As stated quite plainly by the Sixth District: "A conviction for murder does not automatically render one unsuitable for parole." (*Smith, supra*, 114 Cal.App.4th at p. 366, citing *Rosenkrantz, supra*, 29 Cal.4th at p. 683.)

In summary, when every single inmate is denied parole because his or her crime qualifies as a §2402(c)(1) exception to the rule that a parole date shall normally be set, then the exception has clearly swallowed the rule and the rule is being illegally interpreted and applied. When every single life crime that the Board

examines is "particularly egregious" and "especially heinous, atrocious or cruel" it is obvious that the Board is operating without any limits and with unfettered discretion.

Other examples of the failure to 'connect up' the facts of the individual case with the criteria and the ultimate findings abound in the decisions of the reviewing courts. Some of the state cases to have reversed Parole Board or Governor abuses of discretion in denying parole include *In re Roderick*, *In re Cooper*, *In re Lawrence*, *In re Barker*, *In re Gray*, *In re Lee*, *In re Elkins*, *In re Weider*, *In re Scott*, *In re Deluna*, *In re Ernest Smith*, *In re Mark Smith*, and *In re Capistran*.

When "the record provides no reasonable grounds to reject, or even challenge, the findings and conclusions of the psychologist and counselor concerning [the inmate's] dangerousness" the Board may not do so. (*In re Smith* (2003) 114 Cal.App.4th 343, 369.)

When an inmate, although only convicted of a second degree murder, has been incarcerated for such time that, with custody credits, he would have reached his MEPD if he had been convicted of a first, the Board must point to evidence that his crime was aggravated or exceptional even for a first degree murder if they are going to use the crime as a basis for denying parole. (*In re Weider* (2006) 145 Cal.App.4th 570, 582-583.)[4]

[4] This rule, rooted in Justice Moreno's concurrence in *Rosenkrantz*, *supra*, is particularly applicable in this case. Petitioner was convicted of second degree, but acquitted of first degree, murder over 25 years ago. (*People v. Criscione* (1981) 125 Cal.App.3d 275.) With his custody credits he is beyond the matrix even had he been convicted of a first. In a currently pending habeas petition in which he challenges his 2007 parole denial the first reason the Board gave was the crime itself and the presiding commissioner explained: "His actions go well beyond the minimum necessary for a conviction of murder in the second degree." (Decision page 2 of 4/2/07 transcript.) For the Board to penalize the Petitioner for the fact that he was acquitted of first degree is further proof of their willfulness and

A "petitioner's young age at the time of the offense" must be considered. (*In re Elkins* (2006) 144 Cal.App.4th 475, 500, quoting *Rosenkrantz v. Marshall* (C.D.Cal. 2006) 444 F. Supp. 2d 1063, 1065, 1085: "The reliability of the facts of the crime as a predictor for his dangerousness was diminished further by his young age of 18, just barely an adult. 'The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult.'")[5]

The Board's formulaic practice of stating §2402(c)(1) phrased in a conclusory fashion, and then stating "this is derived from the facts" without ever linking the two together, is insufficient. (*In re Roderick*, (2007) ___ Cal.App.4th ___ (A113370): "At minimum, the Board is responsible for articulating the grounds for its findings and for citing to evidence supporting those grounds." (See also *In re Barker* (2007) 151 Cal.App.4th 346, 371, disapproving "conclusorily" announced findings.)

After two decades, mundane "crimes have little, if any, predictive value for future criminality. Simply from the passing of time, [an inmate's] crimes almost 20 years ago have lost much of their usefulness in foreseeing the likelihood of future offenses than if he had committed them five or ten years ago." (*In re Lee* (2006) 143 Cal.App.4th 1400, 1412.) It should be noted that this rule

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bias. The jury had a reasonable doubt that Petitioner committed first degree murder but under the Board's 'reasoning' and 'analysis' this puts him in a worse position than if they had not. Had the jury convicted him of the greater offense Petitioner has served so much time that he would already be having subsequent parole hearings on a first and the Board would not have been able to use the 'some evidence' of first degree behavior against him. As observed previously, the Board's position in this regard is "so ridiculous that simply to state it is to refute it." (*Weider, supra*, 145 Cal.App.4th at p. 583.)

[5] This point is particularly significant in the case of Mike Ngo. Mr. Ngo was only 18 at the time of his crime. The impetus behind the shooting was youth group or

applies with even more force when the Board is relying on any criminality that occurred before the crime. In that situation, just as with the crime itself, the Board must explain why such old events have any relevance and especially when the inmate has spent a decade as a model prisoner.

Murders situationally related to intimate relationships are unfortunately commonplace because emotions are strongest in such domestic settings. When a murder occurs because of "stress unlikely to be reproduced in the future" this is a factor that affirmatively points towards suitability. (*In re Lawrence* (2007) 150 Cal.App.4th 1511 and cases cited therein.)

"The evidence must substantiate the ultimate conclusion that the prisoner's release currently poses an unreasonable risk of danger to the public. It violates a prisoner's right to due process when the Board or Governor attaches significance to evidence that forewarns no danger to the public." (*In re Tripp* (2007) 150 Cal.App.4th 306, 313.)

The Board "cannot rely on the fact that the killing could have been avoided to show the killing was especially brutal." (*In re Cooper* (2007) 153 Cal.App.4th 1043, 1064.)

The Board's focus must be upon how the inmate "actually committed his crimes" not the "incorporeal realm of legal constructs." (*Lee, supra,* 143 Cal.App.4th at p. 1413.) This is especially significant when the murder conviction is based on the felony murder rule, provocative act doctrine, or accomplice liability such that the inmate did not intend to kill or may not have even been

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gang rivalries, posturing, and threats which mature adults would not have been

[redacted]

the actual killer.

The Board has ample guidance before it in the decisions of the various reviewing courts to constrain its abuse, but has failed to avail itself of the opportunity to do so.

SEPARATION OF POWERS DOCTRINE

The evidence presented, as discussed above, has established a void for vagueness "as applied" due process violation. That same evidence also proves a separate but related Constitutional violation -- an as applied separation of powers violation.

The separation of powers doctrine provides "that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068.) Because the evidence has proven the Board is not executing/enforcing the legislature's statutes as intended it is this Court's duty to intervene. The question here is whether the Board is violating the separation of powers doctrine by appropriating to itself absolute power over parole matters and disregarding the limits and guidelines placed by the statute.[6]

"Government Code section 11342.2 provides: 'Whenever by the

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caught up in.

[6] "It is settled that Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them. They must conform to the legislative will if we are to preserve an orderly system of government. Nor is the motivation of the agency relevant: It is fundamental that an administrative agency may not usurp the legislative function, no matter how altruistic its motives are." (*Agricultural Labor Relations Board v. Superior Court of Tulare County* (1976) 16 Cal.3d 392, 419 quoting *Morris v. Williams* (1967) 67 Cal.2d 733, 737, and *City of San Joaquin v. State Bd. of Equalization* (1970) 9 Cal.App.3d 365, 374.)

express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.' Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (*Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1341, citations omitted.)

The vice of overbroad and vague regulations such as are at issue here is that they can be manipulated, or 'interpreted,' by executive agencies as a source of unfettered discretion to apply the law without regard to the intend of the people as expressed by the legislature's enabling statutes. In short, agencies usurp unlimited authority from vague regulations and become super-legislatures that are unaccountable to the people. As it has sometimes been framed and addressed in the case law, a vague or all encompassing standard runs the risk of "violat[ing] the separation of powers doctrine by 'transforming every [executive decisionmaker] into a "mini-legislature" with the power to determine on an ad hoc basis what types of behavior [satisfy their jurisdiction].'" (*People v. Ellison* (1998) 68 Cal.App.4th 203, 211, quoting *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 402.)

"It is concern about 'encroachment and aggrandizement,' the [United States Supreme Court] reiterated, that has animated its separation of powers jurisprudence. 'Accordingly, we have not

hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.'" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 493, quoting *Mistretta v. United States* (1989) 488 U.S. 361, 382.) This articulation of the principle speaks directly to the situation at hand. The Board, by its enactment and interpretation of Title 15, §2402, has appropriated to itself absolute power over 'lifer' matters. Overreaching beyond the letter and spirit of the Penal Code provisions, Title 15, §2402(c)(1) has been interpreted by the Board to supply the power to declare every crime enough to deny parole forever. The fact that Title 15, §2402, has been invoked in every case, but then sometime later not invoked, tends to show either completely arbitrary and capricious behavior or that unwritten standards are what really determine outcomes. In either event, all pretenses of taking guidance from, or being limited by, the legislature's statutes have been abandoned. "[I]t is an elementary proposition that statutes control administrative interpretations." (*Ohio Casualty Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64, 78.) Title 15 §2402 as applied, however, has no controls or limitations.

The PC § 3041(b) exception to the rule can only be invoked when the "gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." The word "gravity" is a directive for comparison just as "more lengthy" indicates a deviation from the norm. While *Dannenberg* held there

does not need to be intra case comparison for the purposes of term uniformity or proportionality, there necessarily has to be some sort of comparison for the purposes of adhering to the legislative mandate that parole is available. The Board employs no meaningful yardstick in measuring parole suitability. This is a violation of the separation of powers doctrine. (*People v. Wright* (1982) 30 Cal.3d 705, 712-713. And see *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 872-873. Compare *Whitman v. Am. Trucking Ass'ns* (2001) 531 U.S. 457, 472, describing a delegation challenge as existing when the legislature fails to lay down "an intelligible principle to which the person or body authorized to act is directed to conform.")

RESPONDENT'S POSITION

The Attorney General has suggested, without pointing to any concrete examples, that it is possible that the Board, when invoking the crime as a reason to deny parole, is not placing it within §2402(c)(1) but instead using is as some sort of 'lesser factor' which, only when combined with other unsuitability criteria, can contribute to a valid parole denial. The two problems with this position are, first, there is no evidentiary support for this assertion, and second, it would have no impact on the constitutional infirmities outlined and proven above.

Even if Respondent had produced evidence that the Board was utilizing the crime as a 'lesser factor' which needs others to fully support a parole denial, the Board would then be admitting it was denying parole, in part, for the very reason that the person is

before the panel and eligible for parole in the first place - the commitment offense. Respondent's argument suggests that a crime that only qualified as the *Dannenberg* "minimum necessary" could still be invoked as a reason for denying parole. Respondent argues that when the crime is invoked 'not in the *Dannenberg* sense,' there must be other reasons for the parole denial and the crime alone would not be enough in this context. This position is inconsistent with the law and fundamental logic.

A crime qualifies under *Dannenberg* when it is "particularly egregious," or one where "no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense." (*Dannenberg, supra*, 34 Cal.4th at pp. 1094-1095.) These are the only two choices. If a crime consists of only the bare elements then it is not aggravated and it cannot, in and of itself, serve as a basis for parole denials once the inmate becomes eligible for parole. It is the reason an inmate may be incarcerated initially for the equivalent of 15 or 25 years, and then examined to determination rehabilitation efforts when they come before the Board, but a crime that is no more than the bare minimum cannot be factored into the equation pursuant to PC § 3041(b) or any of the case law interpreting it.

In oral argument Respondent suggested a second way the commitment offense can be used outside of §2402(c)(1). If for example a crime had its roots in gang allegiances or rivalries and the inmate continued to associate with gangs while incarcerated, then an aspect of the crime, even if the crime otherwise consisted of no more than the minimum elements, could be combined with other behavior

to support a parole denial. Similarly, if a crime was rooted in an inmate's then existing drug addiction, and the Board was to point to a recent 115 involving drugs, the evidence that the inmate's drug issues had not been resolved would justify a parole denial even if the crime itself was not aggravated. A finding that the inmate is not suitable for release under these circumstances, however, is not based on the facts of the commitment offense as tending to show unsuitability. It is based on the conclusion that can be drawn about Petitioner's lack of rehabilitation or change since the offense, and thus, his present dangerousness.

Respondent has not demonstrated any flaws in Petitioner's methodology or analysis, nor provided any actual evidence of the crime being invoked *other* than pursuant to §2402(c)(1). Drawing conclusions from the Board's direct statements, or its precise recitations of the §2402(c)(1) language, logically indicates an invocation of §2402(c)(1), and Respondent's suggestion otherwise is insupportable.

THE QUESTION OF BIAS

Because the issue has been squarely presented, and strenuously argued by Petitioners, this Court is obligated to rule on the charge that the Board's actions prove an overriding bias and deliberate corruption of their lawful duties.

In the discrimination and bias case of *USPS Bd. of Governors* v. *Aikens* (1983) 460 U.S. 711, the United States Supreme Court acknowledged "there will seldom be 'eyewitness' testimony as to the [] mental processes" of the allegedly biased decisionmaker. Instead,

an examination of other cases for trends or patterns can provide the necessary circumstantial evidence. (See *Aikens, supra,* at footnote 2.) Reaffirming that such circumstantial evidence will be sufficient the Court stated: "The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago, 'The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.'" (*Aikens,* at pp. 716-717, quoting *Edgington v. Fitzmaurice* (1885) 29 Ch. Div. 459, 483.)[7]

The discovery in these cases was granted in part due to the Petitioners' prima facie showing of bias and the necessity that it be "adequately supported with evidence" if such evidence is available. (*Ramirez, supra,* 94 Cal.App.4th at p. 564, fn. 5. See also *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483: "A party seeking to show bias or prejudice on the part of an administrative decision maker is required to prove the same 'with concrete facts.'" And see *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 841: "The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice." See also *Hobson v.*

[7] As occurred in *Aikens, supra,* and as suggested in prior orders of this Court, Respondent should have provided direct evidence from the decisionmakers. While the fact that a *Defendant* does not explain his or her actions cannot be held against him, (*Griffin v. California* (1965) 380 U.S. 609, *Doyle v. Ohio* (1976) 426 U.S. 610,) it is appropriate to give some weight to the consideration that the Board has failed to offer any direct evidence or explanation on its own behalf. While the case of *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095 stands for the proposition that <u>Petitioner</u> may not inquire into the Board members mental processes, Respondent is not precluded from offering such direct evidence if they were able to testify as to their good faith and conscientious efforts.

Hansen (1967) 269 F.Supp. 401, 502, the watershed Washington D.C. school desegregation case in which the court determined from a statistical and factual analysis that racial bias was influencing policy.)

In the case of *People v. Adams* (2004) 115 Cal.App.4th 243, 255, a similar claim of biased decision making was asserted and it was rejected because, although the defendant clearly articulated it, "he has not demonstrated it. Therefore, he has failed to bear his burden of showing a constitutional violation as a demonstrable reality, not mere speculation." In the present cases Petitioners have provided overwhelming concrete evidence. It is difficult to believe that the Board's universal application of §2402(c)(1) has been an inadvertent mistake or oversight on their part. It is hard to credit the Board's position that it does not know its own patterns and practices reveal a complete lack of standards or constraints on their power. Respondent's protestations ring hollow, and it seems a statistical impossibility, that the Board's use of "detailed" criteria in such a fashion that they are rendered meaningless is a result of good faith efforts on their part. That <u>every</u> murder is "especially heinous, atrocious or cruel," and can therefore be an exception to the rule that a parole date should be set, does not seem to be an accident on their part.

Although no court has thus far agreed with the accusation that the Board approaches its duties with a predetermination and a bias, no court has previously been presented the comprehensive evidence outlined herein. While this Court does not turn a blind eye to the reasonable conclusion that the Board's unconstitutional practices are

willful, there is another possibility. The pattern of errors demonstrated by the discovery in this case, and the continuously growing body of Court of Appeal opinions finding consistent and persistent abuse of discretion, may instead be caused by the fact that the Board is simply overworked and substantively untrained. The impossibility of the blanket applicability of §2402(c)(1) may be only the result of sloppy preparation and inadvertent carelessness.

The Board must first be given an opportunity to comply with the necessary remedy provided by this court before it is possible to enter a finding of conscious bias and illegal sub rosa policy. To do otherwise would ignore the complexities and magnitude of the largely discretionary duties with which that Board is vested.

CONCLUSION

The conclusive nature of the proof in this case, and the suggestion of institutional bias do not preclude formulation of an remedy which will guarantee adequate restrictions on, and guidance for, the Board's exercise of discretion in making parole suitability determinations. The Board can be made to lawfully perform its duties if given explicit instructions.

As noted supra, a reason the proof in this case irrefutably establishes constitutional violations is because the Board does not, in actual fact, operate within the limiting construction of the regulations. The Board's expansive interpretation allows it to operate without any true standards. Although numerous rulings of both state and federal courts of appeal have invalidated the Board's application of the §2402(c) criteria to particular facts, the Board

does not take guidance from these binding precedents and ignores them for all other purposes. In the most recent of these cases, *In re Roderick*, (2007) ___ Cal.App.4th ___ (A113370) the First District held four of five §2402 factors "found" by the Board to be unsupported by any evidence. At footnote 14 the court took the time to criticize the Board for its repeated use of a "stock phrase" "generically across the state." The court also clarified that "at minimum, the Board is responsible for articulating the grounds for its findings and for citing to evidence supporting those grounds."

There is nothing in the evidence presented that would allow any conclusion but that, without intervention of the Courts, the Board will ignore the lessons of these rulings in the future and continue to employ its formulaic approach of citing a criteria from §2402(c)(1), repeating the facts of the crime, but never demonstrating a logical connection between the two. This is the core problem with the Board's methodology -- they provide no explanation or rationale for the findings regarding the crime itself. This practice results in violence to the requirements of due process and individualized consideration which are paramount to the appropriate exercise of its broad discretion.

The only solution is one that compels the Board to identify the logical connection between the facts upon which it relies and the specific criteria found to apply in the individual case. For example, the Board often finds that an inmate's motive is "trivial" without ever suggesting why, on these facts, that motive is not just as trivial as the motive behind any other murder. What motive is not trivial? By any definition "trivial" is a word of comparison and

only has meaning when there can be examples that are not "trivial."

Similarly, although the Sixth District made it plain four years ago that "all [] murders by definition involve some callousness," (*In re Smith* (2003) 114 Cal.App.4th 343, 345,) the Board has continued to deny countless paroles labeling the crime "callous" without ever suggesting what crime would not qualify as "callous" and without consistently explaining why the individual case before it demonstrates "exceptional" callousness.

Respondent has consistently refused to suggest what possible instances of murder would *not* fit the Board's amorphous application of the §2402 criteria. Citing *Dannenberg*, Respondent insists such comparative analysis is unnecessary. Respondent fundamentally misunderstands the *Dannenberg* holding.

The PC § 3041(b) exception to the rule can only be invoked when the "gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." The word "gravity" is a directive for comparison just as "more lengthy" indicates a deviation from the norm. While *Dannenberg* held there does not need to be intra case comparison for the purposes of term uniformity or proportionality, there necessarily has to be some sort of comparison for the purposes of adhering to the legislative mandate that parole is available. This is implicit in §2402 because the qualifier "especially," in "especially heinous atrocious or cruel," requires that some form of comparison be made. While the original drafters of §2402 seemed to have recognized this fact, the ongoing

conduct of the Board has completely ignored it, and this is the essence of the due process violation Petitioners have asserted.

As noted in his dissent in the recent case of *In re Roderick, supra*, Justice Sepulveda would have deferred to the Board's 'exercise' of discretion because "Board members have both training and vast experience in this field. They conduct literally thousands of parole suitability hearings each year. The Board therefore has the opportunity to evaluate the egregiousness of the facts of a great number of commitment offenses. ... The Board's training and experience in evaluating these circumstances far exceeds that of most, if not all, judges." The evidence in this case, however, suggests a flaw in granting such deference. Since the Board continues to place every murder in the category of offenses "tending to show unsuitability," something is certainly wrong. Since the Board's vast experience is undeniable, the problem must be in the Board's training and understanding of the distinguishing features of the guidelines and criteria. Although Justice Sepulveda presumes that Board members receive substantive training, there is no evidence before this court to suggest that it does, and substantial circumstantial evidence to suggest that it does not.

In the vast numbers of Santa Clara County cases reviewed by this Court, the Board's formulaic decisions regarding the commitment offense do not contain any explanation or thoughtful reasoning. Instead, the Board's conclusionary invocation of words from §2402(c)(1) is linked to a repetition of the facts from the Board report by the stock phrase: "These conclusions are drawn from the statement of facts wherein ..." Thereafter the inmate files a habeas

corpus petition and Respondent, after requesting an extension of time, files a boilerplate reply asserting the Board's power is "great" and "almost unlimited" and thus any "modicum" of evidence suffices. Respondent does not cite or distinguish the expanding body of case law that is often directly on point as to specific findings made. Thereafter, if the writ is granted, the Board is directed to conduct a new hearing "in compliance with due process" and that order is appealed by Respondent. On appeal the order is usually upheld with modifications and in the end, after countless hours of attorney and judicial time, the Board conducts a new two hour hearing at which they abuse their discretion and violate due process in some different way.

This system is malfunctioning and must be repaired. The solution must begin with the source of the problem. The Board must make efforts to comply with due process in the first instance. The case law published over the last five years provides ample and sufficient guidelines and must be followed. Although the Board methods suggest it believes this to be optional, it is not.

THE REMEDY

Thus, it is the order of this Court that the Board develop, submit for approval, and then institute a training policy for its members based on the current and expanding body of published state, and federal, case law reviewing parole suitability decisions, and specifically the application of §2402 criteria. In addition to developing guidelines and further criteria for the substantive application of §2402 the Board must develop rules, policies and

procedures to ensure that the substantive guidelines are followed.

This Court finds its authority to impose this remedy to flow from the fundamental principles of judicial review announced over two centuries ago in *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137. Citing that landmark case, the California Supreme Court has recognized "Under time-honored principles of the common law, these incidents of the parole applicant's right to 'due consideration' cannot exist in any practical sense unless there also exists a remedy against their abrogation." (*In re Sturm* (1974) 11 Cal.3d 258, 268.)

In *Strum* the court directed that the Board modify its rules and procedures so that thereafter "The Authority will be required [,] commencing with the finality of this opinion, to support all its denials of parole with a written, definitive statement of its reasons therefor and to communicate such statement to the inmate concerned." (*Sturm* at p. 273.)

Similarly, in the case of *Minnis, supra*, the California Supreme Court held the Board's policy of categorically denying parole to drug dealers was illegal. Based on its analysis the court there was clearly prepared to order that Board to modify its rules and procedures however such was unnecessary because the Board "voluntarily rescinded" the illegal policy. While the remedy in this case is of greater scope than that necessary in either *Strum* or *Minnis, supra*, so too has been the showing of a systematic abuse of discretion and distortion of process.

The most recent case to address the court's roles and duties in overseeing the parole suitability process has been *In re Rosenkrantz, supra*, 29 Cal.4th 616. In that case the court explained that

judicial review of a Governor's parole determination comports with, and indeed furthers, separation of powers principles because the courts are not exercising "complete power" over the executive branch and do not "defeat or materially impair" the appropriate exercise or scope of executive duties. (*Rosenkrantz* at p. 662.) Citing *Strum, supra*, the court reaffirmed that a life term inmate's "due process rights cannot exist in any practical sense without a remedy against its abrogation." (*Rosenkrantz* at p. 664.)

The *Rosenkrantz* court also put forth what it believed was an extreme example but which, unfortunately, has been shown to exist in this case. The court stated: "In the present context, for example, judicial review could prevent a Governor from usurping the legislative power, in the event a Governor failed to observe the constitutionally specified limitations upon the parole review authority imposed by the voters and the Legislature." This is exactly what the evidence in this case has proven. As noted above the Board has arrogated to itself absolute authority, despite legislative limitations and presumptions, through the mechanism of a vague and all inclusive, and thus truly meaningless, application of standards. The remedy this Court is imposing is narrowly tailored to redress this constitutional violation.

The consequence of the Board's actions (of giving § 2402(c)(1) such a broadly all encompassing and universal application) is that they have unwittingly invalidated the basis of the California Supreme Court's holding in *Dannenberg*. The reason the four justice majority in *Dannenberg* upheld the Board's standard operating procedures in the face of the Court of Appeal and dissent position is because "the

Board must apply detailed standards when evaluating whether an individual inmate is unsuitable for parole on public safety grounds." (*Dannenberg* at p. 1096, footnote 16. See also page 1080: "the regulations do set detailed standards and criteria for determining whether a murderer with an indeterminate life sentence is suitable for parole.") However, Petitioners in these cases have proven that there are no "detailed standards" at all. Instead the Board has systematically reduced the "detailed standards" to empty words. The remedy this Court orders, that there truly be "detailed standards," requires the promulgation of further rules and procedures to constrain and guide the Board's powers. This remedy differs in specifics, but not in kind, from what courts have previously imposed and have always had the power to impose.

The Board must fashion a training program and further rules, standards and regulations based on the opinions and decisions of the state and federal court cases which provide a limiting construction to the criteria which are applied.[8] The Board must also make provisions for the continuing education of its commissioners as new case law is published and becomes binding authority. This Court will not, at this point, outline the requirements and lessons to be taken from the above cases. It is the Board's duty, in the first instance to undertake this task. The training program, and associated rules and regulations, shall be served and submitted to this Court, in

[8]While the showing and analysis in this case was limited to § 2402(c)(1), the conclusions that the evidence compelled, that the Board has been carelessly distorting and misapplying the regulations, is not so limited. Accordingly, the training program that is necessary for the Board can not reasonably be limited to just § 2402(c)(1). Thus, to the extent case law recognizes, clarifies and establishes remedies for other due process violations they must also be incorporated into the necessary rules and training the Board is required to abide by.

writing, within 90 days. Counsel for Petitioners, and any other interested parties, may submit briefs or comments within 30 days thereafter. After receipt and review of the materials this Court will finalize the training program, and associated rules, and the Petitioners in these cases shall receive a new hearing before a Board that does not operate with the unfettered discretion and caprice demonstrated by the evidence here presented.

ORDER

For the above reasons the habeas corpus petition is granted and it is hereby ordered that Petitioner be provide a new hearing which shall comply with due process as outlined above. Respondent shall provide weekly updates to this Court on the progress of its development of the new rules and regulations outlined above.

DATED: Aug 30, 2007

Linda R. Condron
LINDA R. CONDRON
JUDGE OF THE SUPERIOR COURT

cc: Petitioner's Attorney (Jacob Burland)
Attorney General (Denise Yates, Scott Mather)

PROOF OF SERVICE BY MAIL

I THE UNDERSIGNED, CERTIFY THAT I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE. THAT I CAUSED TO BE SERVED A COPY OF THE FOLLOWING DCOUMENT:

ENTITLED: HABEAS CORPUS PETITION

BY PLACING THE SAME IN AN ENVELOPE, SEALING IT BEFORE A CORRECTIONAL OFFICER, AND DEPOSITING IT IN THE [*UNITED STATES MAIL*] AT AVENAL STATE PRISON AND ADDRESSEDIT TO THE FOLLOWING:

FEDERAL DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFRONIA
U.S. COURTHOUSE
450 GOLDEN GATE AVE.,
SANFRANCISCO, CA 94102-3483

EXECUTED ON OCTOBER , 5 , 20 07 AT AVENAL STATE PRISON, AVENAL CALIFORNIA

I, Derreck Sunderland DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAW OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

Derreck Sunderland
SIGNITURE OF DECLARANT

Derreck Sunderland
PRINT NAME OF DECLARANT

PRO PER.